In the analogous cases, where a deed absolute on its face is in fact given by way of mortgage, the American courts enforce the parol agreement.[7] The Wisconsin court, in a leading decision, frankly admits that these cases are indistinguishable, but regards them as an encroachment upon the Statute of Frauds, and refuses to extend the exception.[8] To consider the creation of a constructive trust in cases of this class as a judicial contravention of an express statute seems to be a misconception. The oral trust is given no more weight under these circumstances than in the case of fraud. The grantee may repudiate his express promise with impunity, but in so doing he should not be allowed to enrich himself unjustly at the grantor's expense. Equity therefore fastens upon him a new obligation to return what it is unconscionable for him to keep. This new obligation is a constructive trust, expressly excepted from the operation of the Statute of Frauds. It is raised upon the same principle that creates a resulting trust where property is given upon an express trust which proves to be void. When the oral trust is for the benefit of a third party, a constructive trust for the grantor can hardly be said to contravene the Statute; when the oral trust is for the benefit of the grantor himself, the mere fact that relief by restitution achieves a result identical with that of enforcing the oral trust should be immaterial.[9] The right ought not to be confused with the remedy.

TRANSFER OF ACCOMMODATION PAPER AFTER MATURITY. — Although it is well settled that the transferee of a bill or note after maturity takes it subject to all equitable defenses existing against his transferrer at the date of transfer, there is a sharp conflict as to the rights of the holder of accommodation paper which has not been negotiated until after maturity. By the prevailing American doctrine he is denied relief against the accommodating party;[1] but the English courts allow him to recover.[2] The English law is followed in Maine and Illinois, and has been recently approved in Connecticut.[3] *Mersick* v. *Alderman*, 60 Atl. Rep. 109. The reason sometimes given in support of the American decisions, namely, lack of consideration,[4] is obviously unsound, for it would be equally applicable to cases where the transfer is made before maturity to one who had notice of the nature of the instrument, and would virtually contravene the very purpose of accommodation papers. The extent of the liability of the person who has signed for accommodation should depend upon the reasonable understanding of the parties to the transaction. This is recognized by the English courts, for the

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[7] Campbell *v.* Dearborn, 109 Mass. 130. The Kentucky court is consistent and has not followed these decisions. Manford *v.* Green's Adm'r, 44 S. W. Rep. 419.

[8] Rasdall *v.* Rasdall, 9 Wis. 379, 391.

[9] See Ryan *v.* Dox, 34 N. Y. 306, 319.

[1] Kellog *v.* Barton, 12 Allen (Mass.) 527; Chester *v.* Dorr, 41 N. Y. 279; Peale *v.* Addicks, 174 Pa. St. 549; Cottrell *v.* Watkins, 89 Va. 801.

[2] Charles *v.* Marsden, 1 Taunt. 224; Carruthers *v.* West, 11 Q. B. 143.

[3] Dunn *v.* Weston, 71 Me. 270; Miller *v.* Larned, 103 Ill. 562, 570. Of the American cases cited by the court only the above are square decisions. Harrington *v.* Dorr, 33 Rob. (N. Y.) 275, cited by the court, was reversed on appeal. Chester *v.* Dorr, *supra.* Davis *v.* Miller, 14 Gratt. (Va.) 1, was overruled by Cottrell *v.* Watkins, *supra.*

[4] See Peale *v.* Addicks, *supra.*

accommodation maker may protect himself by taking an express agreement from the payee that the instrument shall not be transferred after maturity.[5]

The basis of the conflict, therefore, is a difference as to the implication to be drawn from the fact of signing the accommodation. The English courts find a contract of continuing guaranty of the payment of the note, irrespective of its terms as to time of payment. The American courts presume that the accommodating party intends to lend his credit only until the maturity of the paper. This latter view seems to accord with the mercantile understanding. The transaction contemplates payment of the instrument at maturity by the accommodated party, and a transfer thereafter is certainly at variance with this idea.[6] This is clearly revealed in the case of an accommodation endorser, who by the very fact of his endorsement is held to contract not to be bound unless the instrument is duly presented at maturity and due notice of dishonor is given. Here there can be no liability upon negotiation after maturity, since performance of these conditions precedent is impossible. In all cases, the agreement, express or implied, not to negotiate after maturity, raises an equity of which a purchaser after the instrument is due is deemed to have notice.

A distinction should, however, be made where the transfer is taken before maturity for collateral security, and further advances are made after maturity. The mercantile notion that a transferee after maturity is bound to make inquiries as to equitable defenses should not be extended to such a case, any more than the doctrine requiring a mortgagee to search the records extends to the case where he makes further advances after subsequent mortgagees have intervened.[7] When once a valid title has been acquired, whether after inquiry or without the necessity for inquiry, it should be protected. Thus, where a note was obtained by fraud and transferred as collateral before maturity, the transferee was protected as to subsequent loans after maturity.[8] Although the principal case, in which the holder of a note given as collateral security was protected as to advances made both before and after maturity, is placed squarely upon the English doctrine, it may well be supported upon this latter ground.

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[5] Parr *v.* Jewell, 16 C. B. 684; see Charles *v.* Marsden, *supra.*
[6] Chester *v.* Dorr, *supra.*
[7] See Ames, Cas. Trusts, 2d ed., 339, n. 1.
[8] Bancroft *v.* McKnight, 11 Rich. (S. C.) 663; Spering's Appeal, 10 Barr (Pa.) 235.